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IN THE

Supreme Court of the United States

October Term, 1963

No. 368

ANGELIKA L. SCHNEIDER,
Appellant,

v.

DEAN RUSK, Individually and as Secretary of State,
Appellee.

On Appeal From the United States District Court for the District of Columbia

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties, filed with the Clerk of this Court.

The American Civil Liberties Union, a national non-profit organization established in 1920, is committed to the inseparable purposes of preserving the democratic principles for which our government was established and to maintaining our civil liberties. Together with all Americans who prize the blessings of United States citizenship and the privileges of freedom which it brings, we seek to guard against the arbitrary deprivation of our birthrights. In the last ten years 15,709 naturalized Americans were

deprived of their citizenship by reason of residence abroad. During this period this ground of expatriation exceeded all others. (1961 Annual Report of the Immigration and Naturalization Service, p. 96.) Most countries of the world do not deem it advisable to predicate loss of citizenship upon this basis.

We believe that the expatriation of naturalized citizens by reason of foreign residence constitutes an encroachment upon the rights of American citizenship given to individuals under the Fourteenth Amendment and that it establishes an unconstitutional discrimination which was neither contemplated nor favored by the draftsmen of our Constitution. This brief is submitted in an effort to assist the Court in its analysis of this encroachment and this discrimination, as well as the constitutional problems thereby raised.

Constitutional and Statutory Provisions Involved

Article I, Section 8, Clause 4

The Congress shall have power * * * to establish a uniform rule of naturalization.

Article II, Section 1, Clause 5

No person except a natural born citizen * * * shall be eligible to the office of President.

Fifth Amendment

No person shall * * * be deprived of life, liberty, or property without due process of law * * *.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.

IMMIGRATION AND NATIONALITY ACT OF 1952

Section 352 of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U. S. C. § 1484, reads as follows:

"Loss of nationality by naturalized national

(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;

(2) having a continuous residence for five years in any other foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act."

Question Presented

Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952 (66 Stat. 269, 8 U. S. C. 1484) providing for the loss of American citizenship by a naturalized citizen who resides continuously in the foreign state of which he was formerly a national, is constitutional.

Statement*

Petitioner, Angelika Schneider, born in Germany in 1934, came to the United States at the age of five, became an American citizen through derivative naturalization in 1950, and remained here continuously from 1939 until 1954. In 1956 she left the United States to marry a German lawyer with whom she has resided ever since with the exception of

* Adapted from the opinion of the court below, 218 F. Supp. 302, 304-305.

a six week visit to the United States in 1957. Petitioner's two sons, born in Germany in 1957 and 1958 have been registered as Americans under 8 U.S.C. 1401(a)(7). However, in 1959 the State Department ruled that petitioner's citizenship was forfeited by three years' continuous residence in Germany. Her six week visit to the United States in 1957 was not considered of sufficient duration to break the continuity of her foreign residence.

Summary of Argument

Article II, Section 1, Clause 5 of the Constitution creates a single, narrowly defined limitation upon the rights of naturalized citizens. They are denied eligibility for the office of the President. No other distinctions between native and naturalized Americans are constitutionally proper. *Osborn* v. *United States Bank*, 22 U. S. 738, 827 (1824); *Luria* v. *United States*, 231 U. S. 9, 22, 24 (1913).

Sources and guides customarily utilized by the courts in ascertaining the meaning of the Constitution all reinforce the view that no other distinction was contemplated. Early English law granted the naturalized citizen equality with the native born. *Coke on Littleton*, fol. 129 a (1628); *Blackstone's Commentaries*, Book I, Chap. 10; *Collingwood and Pace*, 1 Vent., 413, 420, 429; 86 Eng. Rep. 262, 266-267, 272 (Ex. Ch. 1664); *Regina* v. *Manning*, 2 Car and. K 891, 900, 175 Eng. Rep. 374, 378 (Ex. Ch. 1849).

Colonial laws of Virginia, Maryland, Pennsylvania, Massachusetts and Delaware granted the naturalized citizen all the privileges of natural born subjects. "The effect of naturalization in the several States before the Constitution was adopted was, therefore, to remove alienage, the person naturalized standing in all respects upon the same plane with the natural born citizen, except that he was under certain removable political disabilities", *House Document 326*, 59th Cong. 2d Sess., (1906) p. 9.

During the constitutional debates it was suggested that eligibility for Congressional office be confined to natives. IV *Writings of James Madison* (Putnam's Sons, 1906), p. 172; 2 *Farrand, Records of the Federal Convention* 238. The desire to encourage the immigration of worthy foreigners and the dilemma which such a proposal would cause the colonies whose laws had pledged equality between native and naturalized citizens was successfully urged to defeat this proposal. 2 *Farrand, supra,* 270-272; IV *Writings of James Madison, supra,* 173-176.

When the question of the impressment of American seamen arose, Secretary of State James Monroe advised the British Minister that the United States could not discriminate between the native and naturalized citizen, nor ought the British Government "expect it as it makes no such distinction itself". *American State Papers, Foreign Relations,* III, 1787-1828, pp. 454, 464. President Madison, the chief draftsman of the Constitution, likewise asserted "By our law, all the rights of natives are given to naturalized citizens". *Ibid.* at 696.

In 1859 Attorney General Black advised President Buchanan that "a native and naturalized American may • • • go forth with equal security over every sea and through every land under heaven, including the country in which the latter was born". 9 *Op. Atty. Gen.* 360 (1858-59). Attorney General Williams similarly advised President Grant in 1873 that he knew of no principle upon which the rights of native and naturalized citizens residing abroad could be distinguished. *Foreign Relations of the United States,* 1873, Vol. II, pp. 1216, 1218. The Expatriation Act of 1868 (15 Stat. 223, Revised Statutes, Sec. 2000) not only declared that "the right of expatriation is a natural and inherent right of all people", but also asserted that "All naturalized citizens of the United States while in foreign countries, are entitled to and shall receive from this government the same protection of persons and property which is accorded to native-born citizens". In the debates which

led to this enactment, it was frequently acknowledged that naturalized and native-born citizens were identical before the law of this country. *Congressional Globe*, 40th Cong. 2d Sess. (1868), pp. 832, 1013, 1015, 1018. In 1868 the Fourteenth Amendment reasserted, without differentiation, that all persons born or naturalized in the United States are citizens.

It is in the light of this background that the legislative distinctions between native and naturalized Americans must be judged. The 1907 Expatriation Act has been construed to deny diplomatic protection to a naturalized citizen residing abroad for more than two years in his native state or five years in any other foreign state (34 Stat. 1228). However, the Nationality Act of 1940 (54 Stat. 1170, 8 U. S. C. 804) decreed automatic expatriation for naturalized citizens who reside abroad for prescribed periods. These provisions were reenacted in the Immigration and Nationality Act of 1952 (66 Stat. 269, 8 U. S. C. 1484).

The justification for the present discrimination against naturalized citizens is said to be founded in the international policy of our government to lessen friction with foreign governments. *Lapides* v. *Clark*, 176 F. 2d 619 (C. A. D. C., 1949). Testing this discrimination by the standard of *Perez* v. *Brownell*, 356 U. S. 44, 60 (1957), we believe that the means adopted, the withdrawal of citizenship from a selected category of citizens, is not reasonably calculated to effect the end that is within the power of Congress to achieve, and that its differentiation between native born and certain naturalized citizens is so arbitrary as to be a deprivation of due process. The discrimination is based solely upon place of birth. Distinctions "between citizens solely because of their ancestry", this Court has said, "are by their very nature odious to a free people". *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). Distinctions based upon place of birth are no different. Judge Edgerton, dissenting, *Lapides* v. *Clark*, *supra*.

ARGUMENT

I

Historical background and purpose in provisions for expatriation by reason of foreign residence.

The English doctrine of perpetual allegiance naturally precluded expatriation by foreign residence. Under this doctrine citizens might remain abroad indefinitely. *Tsiang, The Question of Expatriation in America Prior to 1907* (1942), Chapt. 1.

In the United States prior to the Act of 1907 there is record twice of Congressional objections against permitting American citizens, native and naturalized, to live abroad. A bill introduced in the House of Representatives in 1808 would have confined citizenship to persons only "while they actually reside in the United States" and would have forever barred from reacquiring citizenship any person expatriated for foreign residence. 18 Cong. Annals 1871, 10th Cong., 1st Sess. The Bill died in committee. *Ibid.*

Loss of protection for those who resided permanently abroad was suggested also in the bill from which the Expatriation Act of 1868 evolved. *House Document 326*, 59th Cong., 2nd Sess., pp. 23, 24. However, this proposal was abandoned in the ultimate legislation and Congress expressly affirmed the right of naturalized citizens to receive the same protection, while in foreign countries, which is accorded to native born citizens. 15 Stat. 223, Revised Statutes, Sec. 2000.

In 1906 a three member citizenship board appointed by Elihu Root recommended that expatriation might be assumed when an American—either native born or naturalized—becomes domiciled in a foreign state. This was

suggested as a rebuttal presumption. In support of this proposal it was said:

> "• • • the class of Americans who separate themselves from the United States and live within the jurisdiction of foreign countries is becoming larger every year, and the question of their protection causes increasing embarrassment to this Government in its relations with foreign powers.
>
> "• • • Naturalized citizens are more apt to go abroad than native citizens. Having already changed their domicile, they are more apt to change it again. • • • It is the duty of the Executive to protect every American from unlawful molestation, but it is not his duty to protect an American from just punishment for violating any law of a foreign country, and the refusal of protection is not necessarily a denial of American citizenship." *House Document 326, supra,* pp. 23, 25, 26.

The embarrassment in question related primarily to the impressment of male citizens into the armed forces of European countries. Great Britain had impressed native born and naturalized Americans in 1812. Later we experienced difficulties with Prussia and other countries as a result of the enforcement of their conscription laws. *House Document 326, supra,* pp. 9-10; *Tsiang, supra,* pp. 75, 99. These problems, however, have been resolved or mitigated by the conclusion of naturalization or military treaties. III *Hackworth, Digest of International Law (1942),* p. 166.[1]

[1] Treaties were concluded with various countries beginning in 1868 when one was concluded with the North German Confederation. 15 Stat. 615. These treaties acknowledged the right of expatriation and permitted punishment for offenses committed prior to emigration. Some required five years residence in the adopted country before expatriation would be recognized. Some like the convention adopted by the Third International Conference of American States held at Rio de Janeiro in 1906, provide for a presumption of expatriation

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Contrary to the recommendations of the 1906 Citizenship Board, Congress in 1907 provided for presumptive loss of citizenship solely for naturalized citizens residing abroad in a country from which they came for two years or in any other foreign country for five years. 34 Stat. 1228. This was interpreted to provide merely for loss of diplomatic protection rather than for loss of citizenship itself. *Camardo* v. *Tillinghast*, 29 F. 2d 527, 530 (C. A. 1, 1928). Under the rules of the State Department, moreover, the presumption of loss of protection might be overcome by the making of "definite arrangements to return immediately to the United States permanently to reside". III *Hackworth*, *supra*, p. 296.

The Nationality Act of 1940 for the first time provided for the loss of citizenship for naturalized citizens residing abroad for three years in countries of their nativity or former nationality or in any other foreign state for five years. 8 U. S. C. 804(b) and (c); 54 Stat. 1170. In suggesting the change from loss of protection to loss of citizenship, the State Department's Passport Office through Mr. Flournoy testified:

> "This, Mr. Chairman, I should say is the most important proposed change in the whole code, and may be the subject of some controversy. We in the State Department, and so far as I know those in the other Departments, think it is a reasonable and most desirable provision. We have every day in the State

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[Continued from page 8]

and reacquisition of native born citizenship when a naturalized citizen resumes residence for two years in the country of his birth. *Tsiang*, *op. cit.*, pp. 88, 90; III *Moore*, *International Law Digest* (1906), pp. 358, *et seq.*; III *Hackworth*, *supra*, p. 377.

For the full text of some of these treaties see *Hearings on H. R. 6127*, *superseded by H. R. 9980*, 76th Cong., 1st Sess., pp. 626, *et seq.* Both the Nationality Act of 1940 and the Immigration and Nationality Act of 1952 (with limited exceptions) provided that its provisions should not be applied in contravention of existing treaties. 8 U. S. C. 810, 1489.

Department cases of persons applying to us for passports or protection, or asking us to support claims, who have been naturalized in the United States and then have gone back and settled down in their native countries and resided there for years. We think there should be some point at which such persons should lose not only his right to protection but his citizenship itself. We consider it very undesirable that we should have persons who are not entitled to the protection of our Government and yet remain as citizens of the United States. It makes it difficult for us to extend the effect of protection to those who are really citizens and have maintained connections with the United States, to have these people retaining their citizenship." *Hearings on H. R. 6127, superseded by H. R. 9980,* 76th Cong., 1st Sess., pp. 134-5.

In the message transmitting the draft of the 1940 Act to the President by the Secretaries of State and Labor and the Attorney General, it was said that:

"In general the right to protection should be co-existent with citizenship, and a law under which persons residing abroad are denied the protection of the Government, although they remain citizens of the United States and transmit citizenship to children born abroad, is deemed inconsistent and unreasonable. The admission of an alien to the privilege of American citizenship is subject to the condition that he intends to reside permanently in the United States and perform the duties of citizenship. When a naturalized citizen abandons his residence in the United States and takes up residence in the state of which he was formerly a national, definite termination of his American citizenship should follow." *Hearings on H. R. 6127, superseded by H. R. 9980,* supra, p. 409.

The explanatory comments of the draft code of the Nationality Act of 1940 set forth this basis for the expatriation provisions:

"While the provision of subsection (b) for loss of nationality in cases of naturalized citizens who

reside for three years in their countries of origin may appear somewhat drastic, it is believed to be fully warranted, by the numerous cases which have been brought to the Department's attention in past years, especially in connection with applications for passports or consular registration, for diplomatic protection, or for the support of claims against the governments of such countries. This provision is not in conflict with the position taken by the Government of the United States in past years with regard to protection of naturalized citizens or with treaties on that subject * * *. * * * It is not to the advantage of the United States to attempt to extend diplomatic protection to such persons who are a distinct liability, rather than an asset, to this country. Moreover (what is quite important), it is believed that a definite provision for the termination of American nationality in these cases will have the effect of persuading foreign states with which the United States has no treaties of naturalization to conclude such treaties and to recognize the American nationality of the persons concerned when they return to their countries of origin for legitimate objects and for residence of a temporary character. * * * Needless to say, naturalized citizens who resume residence in foreign lands from which they came are apt to renew old associations and ways of living and thinking and thus become merged in the native population, losing to a degree, if not completely, their American character and feeling. *Hearings on H. R. 6127, superseded by H. R. 9980, supra,* pp. 495, 496.

Thus, it appears from the foregoing and the thirteen illustrative cases set forth in the hearings at pp. 497-501, that the Department of State was concerned with: (1) Making protection coextensive with citizenship. This could be accomplished by retaining both or terminating the citizenship of those residing abroad. Congress chose to terminate. (2) Preventing the transmission of citizenship to children born to naturalized citizens residing abroad.

This was accomplished by requiring an American citizen married to an alien to reside in the United States for ten years prior to the birth of the child. 8 U. S. C. 1401(a)(7). (3) Encouraging naturalization treaties. Generally, naturalization treaties contained their own provisions for loss of citizenship or protection. Most of them—as in the case of those with various South and Central American states—provide for presumptive loss of citizenship where there is two years residence in one's native country. The 1940 statute was, therefore, inconsistent. In fact, there is no evidence that it has encouraged the conclusion of any treaty whatsoever. (4) Preventing the exercise of citizenship rights by persons who did not intend to reside here permanently at the time of naturalization. This situation can be and is handled by strict enforcement of our naturalization requirements and denaturalization proceedings. 8 U. S. C. 1451(d). (5) Preventing naturalized Americans from renewing "old associations and ways of living and thinking". If such conduct cannot be regulated while the naturalized American is in the United States, can it be regulated during his residence abroad?

Under the 1940 Act naturalized citizens were exempted from the ban on three and five year residences abroad if they were in the employ of the Government, compensated by the Government and residing abroad on account of disability incurred in its service, over sixty-five with a twenty-five year residence in the United States after naturalization, residing abroad to represent a bona fide American organization and receiving substantial compensation therefor, residing abroad on account of ill health, residing abroad to study for not more than five years, residing abroad to be with a naturalized American husband, wife, or parent who is exempt, and if they were native American women who lost citizenship through marriage and reacquired it through naturalization. 8 U. S. C. 805, 806; 54 Stat. 1170. In 1942 exemptions were extended to those residing abroad to be with a spouse or parent who had been in the United States

for ten years during minority, and to veterans of the Spanish American War and the World War and their families. 88 U. S. C. 806(g) and (h), 56 Stat. 1086.

By reason of World War II, the effective date of the expatriation provisions in question was postponed on several occasions. It did not become effective until October 14, 1946. 8 U. S. C. 809, as amended by 59 Stat. 544. These postponements, however, were not sufficient.

In March of 1947 a Special Committee of the National Council on Naturalization and Citizenship published a report on the "Involuntary Loss of American Citizenship." This report was prepared in collaboration with the Department of State and "the sources from which information was obtained were, primarily, American consuls in foreign countries, American social agencies * * * American business organizations having branches or affiliates in foreign countries and interested individuals." In part, this report states:

> "Difficulty in obtaining transportation because of lack of space on passenger boats was reported as the factor known to have caused loss of citizenship by consuls in South Africa, Argentina, Portugal, Sweden, Spain and Italy. A related factor was the high cost of passage from distant points and the inability of some persons to raise the necessary funds within the two months period before the deadline." * * * (pp. 11-12).
>
> "Delays in dealing with requests for passports and other papers by staffs of Government departments in the United States were alleged to have been responsible for the loss of citizenship in several cases." * * * (p. 14)
>
> "The agencies who reported to your Committee give vivid illustrations of further causes. Some persons did not return on time because of the seaman's strike; some could not return because in countries such as Yugoslavia, Roumania and Russia they were unable to obtain exit permits. The war brought finan-

> cial stringency to others making it impossible for them to pay their own passage home or to bring their families with them. Others could not return because they could not obtain exit permits or transportation or necesary travel documents. The search for proof of naturalization took time and the preparation of necessary documents was often delayed by congestion in the offices of American government agencies.
>
> "It is clear that through the enactment of our expatriation laws a considerable number of American citizens were unduly deprived of their citizenship, contrary to their own volition, by factors beyond their own control." (p. 16)

Our State Department has been less than happy with the provisions of law which expatriate naturalized citizens residing abroad. On May 20, 1950[2] Ruth B. Shipley, then Chief of the Passport Division, said:

> "The problem is how to remedy the unexpected cruelty and injustice of those sections of the Code relating to the involuntary loss of nationality—by that I mean loss by:
>
> • • •
>
> "Living two or three years in one's native land or five years in a third country.
>
> • • •
>
> "Residence in one's native land to nurse a sick and elderly parent or a near relative who is helpless

[2] See New York Times of May 21, 1950. Compare the views of Mrs. Shipley in the *Joint Hearings on S. 716*, 82nd Cong., 1st Sess., p. 247, where she confined her views to the removal of expatriation for those residing in third countries. In her testimony she observed: "* * * there are a large number of American women married to foreigners, to men of real distinction and ability and importance in their own country. Well, of course, they are in those countries to live with their husbands, but their being Americans, and presenting in the foreign country the American way of life, friendliness, and good will, I think is a distinct asset for our country, and one particularly at this time."

and alone and perhaps a war casualty has caused many of our citizens to lose citizenship. Do you feel that such unselfish service justifies the loss of citizenship by a naturalized American citizen? The penalties of homesickness and longing to be reunited with family and home in America seem of themselves a heavy price to pay for the normal filial devotion native in our people.

"It is the duty of the Government to protect its citizens. Why, then, should we make stateless persons of those naturalized citizens—doctors, dentists, lawyers, clergymen, engineers, financiers, who work in third countries under the proud titles of American doctor, dentist, etc., just because the calendar rolls up five years residence abroad. Are they not really good neighbors promoting one of our great principles and raising the standards of life through their fine professional training in American institutions—and yet—they are made stateless.

"There is no great change in world affairs that makes it wise or necessary or even desirable to cast away so lightly our citizens who have chosen this country above all others and inflict on them one of the gravest tragedies of all times—statelessness. There are many other instances with which you are familiar which seem to indicate beyond any question that the present law works hardship never dreamed of by those enacting it. We might take a lesson from the British in this. They have always had world-wide interests and realize the importance of keeping loyal British subjects.

"Inasmuch as there has been introduced into the Senate a new version of the Nationality Code, we will be invited to express our recommendations to the Congress and it seems to me the clear duty of those of us who understand the injustice and the un-American character of the penalties inflicted at present on some of our citizens to work earnestly to change the law by presenting the clear picture to our Congress, remembering that the Secretary of State has always the power inherent in his position to withdraw the protection of this Government from

any citizen, native or naturalized, whose actions abroad are inimical to the best interests of the United States. No cancellation of citizenship is necessary. It seems to me the traditional position of this Government that the loss of citizenship should result from a direct act of the citizen which is generally regarded as inconsistent with allegiance to the United States and as expatriation, such as voluntary naturalization in a foreign country, taking an oath of allegiance to a foreign sovereign, taking the oath of renunciation of American citizenship, committing treason or deserting the armed forces in time of war. These represent a group of disloyal acts for which cancellation of citizenship is a normal penalty.

"Reviewing the position of our country today as we endeavor to bind up the wounds of the war and to aid in economic recovery many of the nations and also to better the conditions of the backward countries, we must seriously consider the spiritual and moral devastation wrought unintentionally by acts of our own law. It is our impelling duty to bring the nationality law into harmony with the declaration of human rights and the moral code of brother toward brother."

The bar against foreign residence for three and five years was continued by the Immigration and Nationality Act of 1952: 8 U. S. C. 1484, 66 Stat. 269. The exempt class was expanded to permit residence abroad by reason of the ill health of parent, spouse or child. Inhabitants of American possessions acquiring naturalization by Act of Congress or treaty are placed "on a par with native born citizens with respect to freedom to live abroad indefinitely without losing United States nationality". 8 U. S. C. 1485(10). Veterans of World War I residing in their native lands on the effective date of the Act are permitted to continue their foreign residence. Otherwise, all veterans are exempt solely from the five year residence ban. They are denied residence of more than three years in the country

of their former nationalities. 8 U. S. C. 1486, 66 Stat. 271; *House Report 1365*, 82nd Cong., 2d Sess., p. 85.

These discriminatory provisions have evoked widespread criticism.[3] Typical is the statement of former President Eisenhower on October 21, 1952:

> "Only second-class Americanism tolerates second-class citizenship. It's time to get rid of what remains of both, and that includes rewriting the unfair provisions of the McCarran Immigration Act." *New York Times*, October 22, 1952.[4]

In the same vein, Adlai E. Stevenson wrote on December 28, 1955 (102 Cong. Rec. 83, 84, January 5, 1956):

> "The McCarran-Walter Act of 1952 subjects naturalized citizens to restrictions which do not apply to native-born citizens, for instance, in the matter of the permissible length of residence abroad. The claim that there is no satisfactory basis for such distinctions seems sound * * *."

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[3] Many witnesses appearing before the President's Commission on Immigration and Naturalization in 1952 were critical of what they called the "second-class" citizenship provisions of our nationality laws. *Whom We Shall Welcome, Report of the President's Commission on Immigration and Naturalization* (1953), p. 236.

[4] In a letter dated April 22, 1953, addressed to Senator Watkins, former President Eisenhower said:

> "In the State of the Union Message I pointed out that 'existing legislation contains injustices'. Among the administrative provisions of the law which it is claimed may operate with unwarranted harshness are the following:
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> * * *
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> "4. The provisions under which it is asserted, naturalized citizens have only 'second-class' citizenship because they, as distinguished from native-born citizens, can be expatriated because of residence abroad for certain periods of time, without reference to any other conduct on their part." *Konvitz, Civil Rights in Immigration* (1953), pp. 190, 191.

Thomas K. Finletter observed in a speech on June 12, 1956 (*American Immigration Policy, Selected Statements,* American Immigration Conference, 1957, p. 9):

> "Then too, and deserving of a special category, is the shameful idea of a caste system which we have introduced in this country. We have two kinds of American citizens. We have American-born citizens and American-naturalized citizens. The rights of the two are very different. Just how far this country of ours can go in for this peculiar and un-American idea of caste is beyond me."

II

Congress has no power to discriminate against naturalized citizens by depriving them of their citizenship under circumstances which would not result in such loss by native born citizens.

The Government of the United States is one of delegated and limited powers; it derives its existence from the Constitution and can claim no powers except those granted expressly or by implication in that document. Amendment X; *Marbury* v. *Madison,* 5 U. S. 137 (1803); *Martin* v. *Hunter's Lessee,* 14 U. S. 304 (1816).

The sole power granted Congress with respect to naturalized citizens is found in Article I, Section 8, Clause 4 of the Constitution which grants Congress the right to establish "an uniform Rule of Naturalization." Reading this section against the background of the legal principles prevailing at the time of the framing of the Constitution, the historical circumstances surrounding its incorporation into our supreme law, and the social need it was framed to meet, the conclusion is inevitable that the naturalization contemplated by the Constitution was a naturalization which when validly achieved would place the naturalized citizen on an equal footing with the native born. Thus, under the doc-

trine of limited powers, the sole power granted the Congress is to provide a procedure whereby aliens may attain this parity with native born citizens. Any attempt by Congress to destroy or derogate from the rights and privileges of naturalized citizens and to impose on them liabilities, obligations and burdens not imposed on the native born is beyond its constitutional authority.

This clearly conceived constitutional limitation on Congressional power is indicated not only by the naturalization clause itself, but by Article II, Section 1, Clause 5 of the Constitution which states that "No person except a natural born citizen * * * shall be eligible to the Office of President". Under a well established rule of construction, this specific provision for a single, narrowly defined restriction on naturalized citizens implies the denial of the general power to treat such citizens differently from those born in the United States.[5]

By expressly providing for one distinction between naturalized and native born citizens, that is, eligibility to the Presidency, the Constitution itself has prescribed the only permissible distinction between these citizens. Congress may make no other.

(A) Judicial Expressions

The courts have consistently recognized this want of power in Congress to derogate from the rights of naturalized citizens and have been vigilant in upholding the doctrine of the equality before the law of all citizens, irrespective of national origin. In *Osborn* v. *United States Bank*, 22 U. S. 738, 827 (1824), Chief Justice Marshall held that:

> "A naturalized citizen * * * becomes a member of the society, possessing all the rights of a native

[5] For the use of this rule in interpreting the Constitution, see *Brown* v. *Maryland*, 25 U. S. 419, 438 (1827) (opinion by Chief Justice Marshall); and *Rhode Island* v. *Massachusetts*, 37 U. S. 657, 722 (1838).

> citizen, and standing in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."

In 1913, faced with the claim that a statute providing for the cancellation of a fraudulent certificate of naturalization unlawfully discriminated between naturalized and native born citizens, the Supreme Court was careful to point out that the section in question "makes no discrimination between the rights of naturalized and native born citizens and does not in anywise affect or disturb rights acquired through lawful naturalization." In the course of the opinion, the Court reaffirmed the Constitutional doctrine by that time deeply imbedded in our law that "Under our Constitution a naturalized citizen stands on an equal footing with the native citizen in all respects save that of eligibility for the Presidency." *Luria* v. *United States*, 231 U. S. 9, 22, 24 (1913). See also *Knauer* v. *United States*, 328 U. S. 654, 658 (1945); *Baumgartner* v. *United States*, 322 U. S. 665, 673 (1944); *United States* v. *Macintosh*, 283 U. S. 605, 623-4 (1931); overruled on other grounds, *Girouard* v. *United States*, 328 U. S. 61, 69 (1946); *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135, 162 (1892).

(B) English Background

The constitutional principle of equality among all citizens, naturalized and native born alike, was deep rooted in English law prior to the framing of the American Constitution. This same principle was adopted and practiced by the several states between the time of their Declaration of Independence from England and their formation into the United States of America. This was the principle under which the framers of the Constitution lived; this was the principle which they themselves espoused and this was

the principle which they intended to and did embody in the Constitution of the United States.

With respect to English law, Lord Coke, the great English constitutional jurist, laid down the rule that the "alien naturalized to all intents and purposes is as a natural born subject." *Coke on Littleton*, fols. 129a (1628). Chief Baron Hale in 1664 reiterated that naturalization "put them [aliens] in the condition as if they had been born in England"; "naturalization puts them in the same condition as if born here." *Collingwood and Pace*, 1 Vent. 413, 420, 429, 86 Eng. Rep. 262, 266-267, 272 (Ex. Ch. 1664).[6]

In *Regina* v. *Manning*, 2 Carr and K. 891, 900, 175 Eng. Rep. 374, 378 (Ex. Ch. 1849), C. J. Wilde observed:

> "By Lord Coke, by Lord Bacon, by Sir Matthew Hale, and by, I believe, every text writer, and in all editions of Blackstone by the various learned editors, it is a proposition universally adopted, that a person naturalized becomes to all intents and purposes a British subject."

The single exception to the doctrine of equality of status for naturalized citizens found in our Constitution, that of eligibility to a public office, is significantly the sole exception with respect to equality found in English law. Thus, Blackstone in 1765 stated: "By this [naturalization] an alien is put in exactly the same state as if he had been born in the Kings ligeance; except only that he is incapable * * * of being a member of the privy council or parliament, holding offices, grants, etc." *Blackstone, Commentaries*, Book I, Ch. 10.[7]

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[6] The importance of reference to the common law and to British institutions as they were when the Constitution was framed and adopted in interpreting the Constitution has consistently been recognized by the Supreme Court. See e.g. *Ex parte Grossman*, 267 U. S. 87, 108-109 (1925); *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653-654 (1897); *Ex parte Bain*, 121 U. S. 1, 12 (1886).

[7] For the statutory basis for this distinction, see 12 and 13 W. 3 C. 2 (1700); 7 and 8 Vict. cc. 66 (1844).

(C) Colonial and Constitutional Convention Background

Upon their severance of allegiance from England and their assumption of sovereignty, the several states expressly embraced the English principle of absolute equality between naturalized and native born citizens except with respect to eligibility to public office.

The laws of Virginia gave those who were naturalized all the rights, privileges and advantages of citizens except that they had to meet certain conditions before qualifying for political office. 7 *Laws of Virginia* 19 (1671), 2 *Hening* 289 (1671). The laws of Maryland, Pennsylvania, Massachusetts and Delaware contained similar provisions. See 6 *Laws of Maryland* 2, 5 (1779); *Herty* 377 (1799); 8 *Stats. At Large of Pennsylvania* 337 (1773); 1 *Private and Special Statutes of the Commonwealth of Massachusetts* 1780-1805, 206 (1805); *House Document 326,* 59th Cong. 2d Sess. 8-11 (1906).

> "The effect of naturalization in the several states before the Constitution was adopted was, therefore, to remove alienage, the person naturalized standing in all respects upon the same plane with a natural-born citizen, except that he was under certain removable political disabilities.
>
> The same principle was applied in constructing the Constitution, and in the debates in the Constitutional Convention no one proposed any other principle. Gouverneur Morris said 'he would let them (naturalized citizens) worship at the same alter (with native citizens), but he did not choose to make priests of them' (*Madison's Writings,* IV, 159), and this was the sentiment which finally resulted in the provision that the President must be a natural-born citizen (Art. II, Sec. 1), and that no one shall be a Representative who has not been a citizen for seven years (Art. I, Sec. 2), or a Senator who has not been a citizen for nine years (Art. I, Sec. 3)." *House Document 326, supra,* p. 9.

During the Constitutional Convention debates as to eligibility for Congressional office, Mr. Gerry stated that he

"wished that in the future eligibility might be confined to natives. Foreign powers will intermeddle in our affairs and spare no expense to influence them." IV *Writings of James Madison (Putnam's Sons* 1906), p. 172. Colonel Hamilton responded:

> "There was on one side the possible danger that had been suggested. On the other side, the advantage of encouraging foreigners was obvious and admitted. Persons of moderate fortunes will be fond of coming here where they will be on a leval with the first class citizens. He moved that the section be so altered to require merely citizenship and inhabitancy." IV *Writings of James Madison, supra*, p. 173-4.

James Madison, the chief draftsman of the Constitution, seconded the motion:

> "He wished to maintain the character of liberality which had been proferred in all the Constitutions and publications of America. He wished to invite foreigners of merit and republican principles among us. America was indebted to emigration for her settlement and prosperity." IV *Writings of James Madison, supra*, p. 174.

Mr. Ghorum observed in this connection that:

> "When foreigners are naturalized it would seem as if they stand on an equal footing with natives." IV *Writings of James Madison, supra*, p. 176.

In response to the argument that the states alone had pledged equality to naturalized citizens, James Madison said:

> "It was said that the United States as such have not pledged their faith to the naturalized foreigners and therefore are not bound. Be it so and that the States alone are bound. Who are to form the new Constitution by which the condition of that class of citizens is to be made worse than the other class? Are not the States ye Agents? * * * Will not the new

Constitution be their Act?" IV *Writings of James Madison, supra*, pp. 176-177.

"We should moreover reduce every State to the dilemma of rejecting it or violating the faith pledged to a part of its citizens." 2 *Farrand, Records of the Federal Convention*, pp. 271-272.

The principle that citizenship by naturalization confers a status in all respects equal to that of citizenship by birth, was, therefore, a principle firmly fixed in the legal background of the delegates to the Constitutional Convention. It was an integral part of that abhorrence of second-class citizenship which led to their own revolt from England. Moreover, as the debates show, there were strong practical reasons why this principle should have been written into the Constitution.

Immigration was vital to the future of the new country,[8] and naturalization was one of the prime incentives to immigration. Any inequality for those achieving their citizenship through naturalization was recognized by the framers as a deterrent to such immigration.

In addition, another chief aim of the Constitutional Convention was to foster unity and harmony among the various states. To empower the Federal Congress, already an object of suspicion in many areas, to derogate from the rights of those who had been naturalized under state laws in the years immediately preceding the Convention would be wholly disruptive of this aim.

Perhaps the most significant evidence that the framers of the Constitution intended to deny Congress the power to make any distinctions between naturalized and natural

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[8] The Declaration of Independence cited as a grievance against George III that "[he] has endeavored to prevent the Population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither * * *."

born citizens was their rejection of a draft empowering Congress to "regulate" naturalization. This draft was interpreted by Madison as giving Congress the power to legislate concerning the enjoyment by the naturalized of the various privileges of citizenship. 2 *Farrand, supra,* 144, 167, 235; 4 *Farrand, supra,* 45. Its rejection, coupled with the specific inclusion of a clause distinguishing between naturalized and native born citizens with respect to eligibility to the Presidency, and the grant of a carefully limited power to naturalize show conclusively that the Founding Fathers deliberately determined not to endow Congress with the power to curtail to any extent the rights and privileges of naturalized citizens in comparison with those possessed by the native born.

(D) Views Subsequent to Adoption of Constitution

All statements concerning the status of naturalized citizens in the period immediately after the adoption of the Constitution bear further evidence that the framers of that document viewed Congress' power to naturalize aliens as conferring a status identical to that of the native born citizen, with the sole exception being specifically set forth in the Constitution.

As early as 1812 when the question arose as to English impressment of American seamen, many of whom were naturalized citizens, Secretary of State James Monroe, recognizing the inability of the United States government to discriminate against naturalized citizens, advised the British Minister at Washington:

> "Your proffered exertions to procure the discharge of native American citizens from on board British Ships of war, of which you desire a list has not escaped attention. It is impossible for the United States to discriminate between their native and naturalized citizens, nor ought your Government to expect it as it makes no such discrimination it-

self." Letter from Monroe to Foster, May 30, 1812, *American State Papers III, Foreign Relations 1787-1828,* 454, 464.

President Madison agreed. He instructed the American Commissioners appointed to conduct the peace negotiations, following the War of 1812 that "By our law, all the rights of natives are given to naturalized citizens." Madison to Binns, February 11, 1813, *Letters and Other Writings of James Madison* (1865) II, 558.

In 1859 Attorney General Black advised President Buchanan that:

> "a native and naturalized American may * * * go forth with equal security over every sea and through every land under heaven, including the country in which the latter was born." 3 *Op. Atty. Gen.* 360 (1858-59).

Attorney General Williams similarly advised President Grant in 1873 that he knew of no principle upon which the rights of natives and naturalized citizens residing abroad could be distinguished. *Foreign Relations of the United States, 1873,* Vol. II, pp. 1216, 1218.

On July 27, 1868, Congress enacted a statute, 15 Stat. 223, Revised Statutes, Sec. 2000, providing:

> "All naturalized citizens of the United States are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens."

This legislation was in response to the arrests by the German States of naturalized citizens for non-performance of military service and to the numerous arrests by the English government of naturalized citizens of Irish origin for political offenses. Hundreds of petitions had been sent to Congress from state legislatures and others requesting this enactment. *House Document 326, supra,* pp. 10-11. In

the debates which led to the enactment of the Act of 1868, it was frequently acknowledged that naturalized citizens and native born had the same rights.

Congressman Banks of the Committee on Foreign Affairs who presented the legislation declared:

> "* * * the naturalized citizen has exactly the same right in a foreign Government that a native-born citizen of the United States enjoys. There is no difference. There is no privilege for one that the other may not claim, and it is the first and highest duty of the American Government to accord its protection to the naturalized citizen in exactly the same degree that it does to the native-born citizen. And this bill proposes to establish that principle. It is the first time that it has been proposed in the form of a legislative declaration." *Cong. Globe,* 40th Cong., 2d Sess., p. 832.

Congressman Chanler, agreeing, stated:

> "At home or abroad no distinction exists among American citizens according to all established declarations of this Government. There can be no just distinction in law or fact made between citizens of the same Government and certainly no act of Congress should establish such distinction * * *." *Cong. Globe, supra,* p. 1015.

Congressman Woodward was of a like opinion:

> "By naturalization the foreigner becomes an American citizen, except for one or two purposes, as truly as if he was 'native to the mannor born'. And when he returns to his native country, either for business or pleasure, he is entitled to the same measure of protection that any American citizen has the right to claim." *Cong. Globe, supra,* p. 1018.

Thus, it clearly appears that the sources and guides customarily employed in ascertaining the meaning of the Constitution all point to a purpose not to distinguish be-

tween native or naturalized citizens except with regard to very limited classes of political office. The English law, the laws of the various states at the time of the adoption of the Constitution,[9] the necessities which gave birth to the Constitution,[10] the statements contemporaneous with its adoption, the alternate drafts considered and rejected, and the contemporaneous construction following adoption of the Constitution, all point inevitably to the construction which the amicus urges. They establish that the Constitution must be read as stating that Congress shall have power to pass a uniform rule providing the method whereby aliens can achieve a status equal in all respects to the native born but shall have no other power in connection with the status of naturalized citizens. Specifically Congress shall not have power to impose upon such citizens any limitations or burdens which do not apply equally to native born citizens.

The Fourteenth Amendment to the Constitution, the first comprehensive definition of United States citizenship,[11] serves to underscore that there is only one category of "citizens of the United States" whatever may be the origin or the means of attaining such citizenship. That amendment provides "All persons born or naturalized in the United States * * * are citizens of the United States". Section 352 of the Immigration and Nationality Act of 1952 is wholly inconsistent with this definition of a single indistinguishable class of citizens. That statute is based upon the

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[9] With respect to state law as an aid in the construction of the Constitution, see: *Waring* v. *Clarke*, 46 U. S. 441, 457 (1847); *Marshall* v. *Gordon*, 243 U. S. 521, 534, 535 (1917).

[10] The importance of the needs a particular provision was designed to meet in interpreting the Constitution is pointed out in *Legal Tender Cases*, 79 U. S. 457, 531 (1870); *Knowlton* v. *Moore*, 178 U. S. 41, 95 (1900).

[11] *Slaughter-House Cases*, 83 U. S. 36, 72 (1873).

contrary concept, never a part of our history or of our law, that there are two classes of citizens: "native born citizens of the United States" endowed with a preferred status and "naturalized citizens of the United States" forced to accept an inferior position. Such a thesis should be unequivocally repudiated by this Court.

III

The Immigration and Nationality Act's discrimination between native born and naturalized citizens residing abroad is arbitrary and violative of due process.

The severity of our expatriation laws, their necessity and their discrimination between native born and naturalized citizens may be compared with the requirements of other countries throughout the world. In this connection, it should be remembered that these countries are not restricted by the same constitutional limitations as is the United States.

Of eighty-four countries examined (see Laws Concerning Nationality, United Nations Legislative Series, 1954), only nineteen were found which expatriate for foreign residence. Four countries, Czechoslovakia, Hungary, Pakistan and Yugoslavia, make no distinction between naturalized and native born citizens. Illegal departure may result in expatriation in the first two countries; residence abroad for seven and five years, respectively, without registration expatriate in the other two. Australia, South Africa, and the United Kingdom provide for the expatriation of naturalized citizens remaining abroad for seven years without registration. Seven years' foreign residence may expatriate in Thailand. Israel, Costa Rica, and Nicaragua use seven, six, and five years respectively, but all three require an absence of connections with the country. Canada uses six years' residence abroad with the right to grant

extensions, Ceylon employs five years, Cuba three years without registration, Guatemala two years, Mexico five years in the country of origin, and New Zealand six years with a requirement that expatriation be conducive to the public welfare. In El Salvador residence in the country of origin for two years and in other foreign countries for five years without permission results in loss of nationality by a naturalized citizen. In Liberia similar periods bring about a presumption of loss of citizenship.

We submit, therefore, that our expatriation laws rank high as the most severe and unyielding in the world.

Congress has established a crazy patch quilt of favoritism and discrimination between naturalized citizens residing abroad.

1. Naturalized Americans who acquired naturalization as a result of acquisition of territories or possessions through treaties or acts of Congres are given the same rights of residing abroad as native born citizens. 8 U. S. C. 1485(10).

2. Naturalized citizens who were native born and who were expatriated by marriage to an alien and then reacquired citizenship are likewise given full freedom to reside abroad. 8 U. S. C. 1485(9).

3. Veterans of the Spanish American War or World War I residing abroad in their native land on December 24, 1952, are granted the right to continue such residence. They and all other war veterans have freedom to reside indefinitely in foreign countries other than those of their former nationality. 8 U. S. C. 1486.

4. Naturalized Americans who reside in the United States for ten years during minority and who have a native born spouse or child may reside abroad indefinitely with them. 8 U. S. C. 1485(8).

5. Naturalized Americans sixty years old who resided in the United State for twenty-five years after naturalization are free to reside abroad. 8 U. S. C. 1485(3).

6. Governmental employment, Governmental compensation, business reasons and ill health likewise furnish bases for exemption from foreign residence bans. 8 U. S. C. 1485(1, 2, 4, 5).

These exemptions, except for those based upon Governmental employment, commercial, religious, or educational grounds, were not based upon foreign policy considerations. The possibility of international friction did not preclude exemptions for naturalized citizens from acquired territories, for repatriated women, for veterans, nor for naturalized citizens with ten years residence during minority. Obviously these groups were granted favored treatment because of personal backgrounds. Humanitarian motives have given the sixty year old naturalized citizen the benefit of an exemption. *Hearings on H. R. 6127, superseded by H. R. 9980, supra*, p. 502. We, therefore, question whether the classifications herein can be sustained upon a foreign policy argument.

The distinctions of the expatriation laws should be appraised in the light of the reasons advanced for the legislation here under attack. Historically, our greatest problem has been the involvement with foreign governments who have impressed Americans residing abroad into their military service, who have punished them for non-performance of military duties. We have had this problem, as in the War of 1812, with regard to native born Americans and since that time with native Americans with dual nationality. *III Hackworth, supra*, pp. 352, *et seq.* We have never had this problem with regard to women.

The bar against foreign residence, however, is applied equally to men and women and regardless whether or not they are liable to military conscription abroad. The bar is not applied to dual nationals who take an oath of al-

legiance to the United States (8 U. S. C. 1482) even though their presence abroad may result in conscription. The solution to the international conflicts on military service has been sought and found to a large degree in treaties. *III Hackworth, supra,* pp. 377, *et seq.* Treaties removed the problem originally presented by Great Britain's claim of perpetual allegiance and it removed the difficulties experienced at one time with Prussia. If there is in fact a problem created by the foreign residence of naturalized citizens, the solution lies in the negotiation of treaties with foreign governments to resolve the rights of United States citizens, rather than an arbitrary revocation of citizenship of one class of citizens.

The Committee recommending expatriation of naturalized citizens for foreign residence, itself urged in support of this provision that it would encourage naturalization treaties. Experience does not justify the statute on this ground, for no additional treaty has been prompted by our 1940 or 1952 expatriation laws.

Moreover, the expatriation provisions conflict with most of our treaties which provide for the presumptive loss of citizenship by two—not three years residence in the country of former nationality. See *III Hackworth, supra,* p. 414.

Our expatriation laws were suggested to prevent improper naturalization. Denaturalization laws and proper enforcement of our naturalization requirements are the answer to this situation. 8 U. S. C. 1451(d). Preventing the transmission of citizenship to children born abroad was likewise advanced as a ground for this legislation. However, regulation of these cases is controlled by 8 U. S. C. 1401(a)(7) under which petitioner has already conferred citizenship upon her sons born in Germany. Finally, it is contended that naturalized citizens residing abroad tend to renew "old associations and ways of living and thinking". We submit that this is not a proper subject for the control

of Congress either while the naturalized citizen resides abroad or at home.

Two questions are posed by the problem presented here:

First, is it reasonable for Congress to restrict residence abroad by all citizens merely because of ordinary difficulties encountered by the State Department in protecting their interests while they remain in foreign lands? "The right to travel is a part of the 'liberty' of which a citizen cannot be deprived without due process of law of the Fifth Amendment. * * * 'Our nation' wrote Chafee, 'has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases'." *Kent, et al.* v. *Dulles*, 357 U. S. 116, 125, 126 (1957).

In *Perez* v. *Brownell*, 356 U. S. 44, 58 (1957), this Court stated:

> "Since Congress may not act arbitrarily a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means—withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs."

It must, therefore, be conceded that citizens of the United States may not be denied residence abroad capriciously.

Second, is the denial of residence abroad based upon arbitrary grounds? Is the classification between native born and certain types (but not all) of naturalized citizens arbitrary?

The Government admits in its Memorandum filed in response to the Petition for Certiorari herein that varying treatment of different groups may be upheld, "upon a showing that the classification was reasonably devised to meet a demonstrated need". The demonstrated need is said to be the greater *possibility* that residence abroad by

naturalized citizens would produce international disputes (pp. 11, 12).

The classification is based upon place of birth and is applied only to some not so favored naturalized citizens. Such a classification should have compelling basis to withstand constitutional attack. As this Court stated in *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943):

> "Distinction between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

Judge Edgerton, dissenting, observed in the same vein that:

> "Distinction because of birthplace are equally arbitrary." *Lapides* v. *Clark*, 176 F. 2d 619, 623 (C. A. D. C., 1949).

Four criteria usually applied in determining the reasonableness of a classification are (1) the deprivation involved; (2) the conditions existing prior to the legislation; (3) the possibility of achieving the same benefits at a lower price; and (4) effectiveness of the new legislation to improve conditions. *The Consideration of Facts in "Due Process Cases"*, 30 Col. L. Rev. 360 (1930). An analysis based upon these criteria demonstrates the utter constitutional failure of Section 352 of the Immigration and Nationality Act of 1952.

1. *The Deprivation Involved.* This Court has referred to the right of American citizenship as "no less precious than life or liberty, indeed * * * one which today comprehends those rights and almost all others." *Klapprott* v. *United States*, 335 U. S. 601, 616 (1949). American citizenship has also been called "the highest hope of civilized men." *Schneiderman* v. *United States*, 320 U. S. 118, 122 (1943); and "all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 (1922).

Loss of citizenship is particularly important where it results not only in loss of certain civil and constitutional rights but in the infinitely greater penalty of exile and banishment from the United States. This is the effect of Section 352. The individual deprived of citizenship by that section, since he is already outside the United States and not permitted to return, loses in one fell swoop all rights, advantages and opportunities possessed by those living in the United States whether they be citizen or alien. Even the sponsors of the present legislation acknowledged that it "may appear to be somewhat drastic." *Hearings on H. R. 6127, superseded by H. R. 9980, supra*, p. 495.

2. *Conditions Existing Prior to the Legislation.* Where such basic rights and principles are at stake an affirmative showing must be made that a reasonable need exists for the statute in question. This means that in order to justify Section 352 and assuming for the purposes of argument only that naturalized citizens may be treated differently from native born, it must be shown that there is a reasonable need for the discriminatory classification. Was there a reasonable need to prevent the residence abroad in lands of former nationality of naturalized American women, like petitioner? Every one of the thirteen cases cited by the State Department as illustrating the need for the legislation herein involved a male citizen. *Hearings on H. R. 6127, superseded by H. R. 9980, supra*, pp. 497-501. Nor do the cases reveal the pendency of any international disputes caused by foreign residence. The foreign conflicts of an earlier era over military conscription of our male citizens had been solved by naturalization treaties. Such foreign conflicts never had related to American women. Moreover, the legislative history here does not explain the details of any alleged international complications with any named countries. On the contrary, it only speaks of "difficulties and embarrassment to the Government of the United States". *Ibid.*, p. 495. Specificity is lacking. Finally, as we observed, *supra*, discrimination and favoritism between

naturalized citizens residing abroad are not based upon foreign policy considerations. We, therefore, submit that conditions existing at the time this legislation was enacted did not call for the invocation of our power to regulate foreign affairs by terminating the citizenship of naturalized Americans.

3. *The possibility of Achieving the Same Benefits at a Lower Price.* Before Congress may pass and this Court sanction legislation which is so serious an invasion of individual rights and so great a perversion of the traditional principle of the equality of all citizens, it is incumbent upon them to consider the alternative means already available to combat the alleged "evil" sought to be remedied. *Schneider* v. *Irvington*, 308 U. S. 147, 162 (1939); *DeJonge* v. *Oregon*, 299 U. S. 353, 364-5 (1937). See also *Thomas* v. *Collins*, 323 U. S. 516, 532 (1944); *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1939).

In the case of the legislation at bar ample means exist to prevent the prolonged residence of naturalized citizens abroad from resulting in international complications. As the then Chief of the Passport Division pointed out in 1950, after criticizing the present stringent legal requirements imposed on naturalized citizens abroad, "The Secretary of State always has the power to withdraw American protection from many native or naturalized citizens whose actions abroad are inimical to the best interests of the United States." See statement of Mrs. Ruth B. Shipley, *supra*. Such was the course pursued for over one hundred years prior to the present enactment.

With respect to those persons whose prolonged residence abroad follows so soon after American naturalization as to create a presumption that naturalization was not obtained in good faith, denaturalization proceedings may be instituted and the naturalization certificate canceled under 8 U. S. C. 1451(d). Strict enforcement of our natu-

ralization requirements—a situation presently in existence—has prevented the grant of acquired citizenship to *mala fide* applicants.

The transmission of citizenship by naturalized persons residing abroad has likewise been controlled by other sections of the law. A naturalized citizen married to an alien, as in petitioner's case, cannot transmit citizenship unless he has been physically present in the United States for ten years, at least five of which were after attaining the age of fourteen years. 8 U. S. C. 1401(a)(7).

Finally, as we have stated before, the legislation here under attack was neither needed for, nor did it ever bring about, the execution of a single treaty.

Thus it can be seen that the discrimination worked by Section 352 is unreasonable not only because the evil it was designed to remedy has been shown to be hypothetical but because that evil even if it became a reality could be adequately met by other legislation already in existence. "The people through their legislatures may protect themselves against * * * abuse * * *. The legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *DeJonge* v. *Oregon*, 299 U. S. 353, 364-5 (1937).

Analysis having revealed a complete absence of abuse in the instant situation and having indicated ample safeguards against such abuse should it arise, the alleged "legislative justification" relied on to uphold the constitutionality of Section 352 disappears.

4. *Effectiveness of Legislation to Improve Conditions.* Ruth Shipley, former Chief of the Passport Division, has advised us of the injustices caused by the present legislation. There has been no showing whatever that the discrimination which it imposes upon naturalized citizens has in any way lessened international friction. Absent such a showing, even were the discrimination within the constitutional power of Congress, it must be held unwarranted.

CONCLUSION

Section 352 has been revealed as arbitrary and discriminatory legislation which strikes at one of the basic tenets of our republic—the equality of naturalized and native born citizens. It should be invalidated as unconstitutional legislation.

Respectfully submitted,

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